Supreme Court, U.S.
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No.

In The
SUPREME COURT OF THE UNITED STATES

October Term, 2000

In Re OCEAN T. ROSE,
LANCE CORPORAL, U.S. MARINE CORPS, *Petitioner*

PETITION FOR A WRIT OF MANDAMUS AND PROHIBITION TO COMMANDING OFFICER, HEADQUARTERS AND HEADQUARTERS SQUADRON, MARINE CORPS AIR STATION MIRAMAR, CONVENING AUTHORITY, AND LIEUTENANT COLONEL FRANCIS DELZOMPO, MILITARY JUDGE, Respondents

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QUESTION PRESENTED

Where a servicemember refuses to obey an order to be injected with the anthrax vaccine because the order to take the vaccine violates 10 U.S.C. § 1107,

DOES A MILITARY JUDGE USURP THE SOLE AUTHORITY OF THE FINDER OF FACT BY RULING THAT AN ELEMENT OF AN OFFENSE [THAT AN ORDER IS A LAWFUL ORDER] HAS BEEN PROVED AND THAT A DEFENDANT MAY NOT CONTEST THAT ELEMENT OF THE OFFENSE BEFORE THE FINDER OF FACT?

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 2000

In Re OCEAN T. ROSE,
LANCE CORPORAL, U.S. MARINE CORPS, *Petitioner*

PETITION FOR A WRIT OF MANDAMUS AND PROHIBITION

Lance Corporal Ocean T. Rose, U.S. Marine Corps, prays this Court issue a writ of mandamus and prohibition to Commanding Officer, Headquarters and Headquarters Squadron, Marine Corps Air Station Miramar, the convening authority, and Lieutenant Colonel Francis Delzompo, military judge, directing 1) that the finder of fact, and not the military judge, decide whether the United States has proved the elements of the offense Lance Corporal Rose is accused of violating, and 2) that Lance Corporal Rose be permitted to contest before the finder of fact in his court-martial the lawfulness of the order to receive an anthrax vaccination, an element of the offense he is accused of violating. Lance Corporal Rose does not ask this Court for a determination that the order to take the vaccine was illegal, but merely that he be afforded the chance to contest the lawfulness of the order before the finder of fact. Relief is requested on the grounds that the due process clause of the Fifth Amendment and the Sixth Amendment right to a jury trial requires the finder of fact, not the military judge, to make such determinations.

OPINIONS BELOW

The decision of the Navy-Marine Corps Court of Criminal Appeals, denying Petitioner's Petition for Writ of Mandamus is found in the Appendix, *infra* at 1*a*.

The order of the Court of Appeals for the Armed Forces denying Petitioner's Writ Appeal Petition is found in the Appendix, *infra* at 8*a*.

JURISDICTION

On January 19, 2001, the Court of Appeals for the Armed Forces denied a Writ Appeal Petition to review the decision of the Navy-Marine Corps Court of Criminal Appeals to deny Petitioner's Petition for Extraordinary Relief. As the convening authority has not acted on the findings and sentence of the court-martial in accordance with 10 U.S.C. § 860, Petitioner is currently without the right to appeal. Petitioner has exhausted his avenues for review by the military courts. Accordingly, this Court's jurisdiction is invoked under the All Writs Act, 28 U.S.C. § 1651(a).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution reads, in relevant part:

> ...nor [shall any person] be deprived of life, liberty, or property, without due process of law;...

The Sixth Amendment to the Constitution reads, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...

STATUTORY PROVISIONS

Article 90, Uniform Code of Military Justice, 10 U.S.C. § 890 (2000) reads in relevant part:

> Any person subject to this chapter who-
> (2) willfully disobeys a lawful command of his superior commissioned officer;
> shall be punished...as a court-martial may direct.

STATEMENT OF THE CASE

Lance Corporal Rose was charged with disobeying his superior commissioned officer by refusing to be injected with the anthrax vaccine, in violation of 10 U.S.C. § 890, Article 90, of the Uniform Code of Military Justice.

On July 13, 2000, the military judge granted the government's motion *in limine* to establish the lawfulness of the order to take the anthrax vaccine and to exclude evidence of the safety and efficiency of the anthrax vaccine. Defense motions to dismiss the charge due to the unlawfulness of the order and to compel expert and lay witnesses and discovery were denied.

Petitioner filed a Petition for Extraordinary Relief with the Navy-Marine Court of Criminal Appeals (NMCCA) on August 4, 2000. On that same date, the NMCCA stayed the proceedings and ordered the Government to show cause as to why the petition for extraordinary relief should not be granted. On November 29, 2000, the NMCCA denied the request for extraordinary relief and lifted the stay from the trial court. The case was then scheduled to be tried on January 30, 2001.

On December 18, 2000, Petitioner filed a Writ-Appeal Petition with the Court of Appeals for the Armed Forces (CAAF). On January 19, 2000, the CAAF issued a decision denying Petitioner's writ-appeal without prejudice.

The case was tried on February 13-15, 2001 and Lance Corporal Rose was convicted of all charges against him. He was sentenced to reduction in rank from E-3 to E-1 and to be

separated from the U.S. Marine Corps with a bad-conduct discharge.

PARTIES AGAINST WHOM RELIEF IS SOUGHT

Commanding Officer, Headquarters and Headquarters Squadron, Marine Corps Air Station Miramar, California, convening authority.

Lieutenant Colonel Francis Delzompo, U.S. Marine Corps, military judge.

REASONS FOR GRANTING REVIEW

A court martial is not concluded until the convening authority for that court-martial approves the results. 10 U.S.C. § 860. Several months may pass between the date of trial and the convening authority's action. During that time the military judge may still hear matters on the case. Rule for Courts-Martial 1102, Manual for Courts-Martial (2000 ed.). During this time a servicemember has no right to appeal. Article 66(b). Thus, Lance Corporal Rose's court-martial is ongoing, and, unless this Court intervenes, he will continue without a right to direct appeal.

In Lance Corporal Rose's case, the Government was not required to prove all the elements of the offense to the finders of fact, given the military judge's ruling that the order to take the anthrax vaccine was lawful. Lance Corporal Rose was forbidden at trial from contesting the element of lawfulness.

Such decisions are not within the discretion of any judge. By making this ruling the military judge arrogated unto himself powers that are the *sole* province of the finder of fact, in violation of the due process clause of the Fifth Amendment and the Sixth Amendment right to a jury trial.

Petitioner requires a writ from this Court to compel the military judge and the convening authority to obey the Constitutional provisions and holdings of this Court which require that the *finder of fact* decide whether the elements of an offense are proved.

ARGUMENT

The military judge usurped the sole authority of the finder of fact by ruling that an element of the offense [that the order to take the anthrax vaccine was a lawful order] was proved and that Petitioner could not contest that element of the offense before the finder of fact.

The order given to Lance Corporal Rose by Lieutenant Colonel P.D. McGraw, his commanding officer, to take the anthrax vaccine is in violation of the notice and informed consent rights conferred upon service members by 10 U.S.C. § 1107 (2000). Because it was in violation of a statutory right, the order was not a lawful order.

Disregarding the Government's non-compliance with 10 U.S.C. § 1107 and the requirement that the finder of fact judge the guilt or innocence of an accused, the military judge proclaimed the order lawful. Although Lance Corporal Rose

presented overwhelming evidence to the contrary and the Government presented no persuasive evidence to support a presumption that the order to take the anthrax vaccine was lawful, the military judge created a mandatory conclusive presumption of lawfulness.

a. The ruling by the military judge that the order to take the anthrax vaccine is legal creates a mandatory conclusive presumption of lawfulness, which completely excludes an essential element of the offense from determination by the trier of fact.

The Constitution "'indisputably entitle[s] a criminal defendant to a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt'." *Apprendi v. New Jersey*, 530 U.S. 466, 447 (2000) quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995). This requires that the elements of a crime be proved to a *finder of fact*. In *Gaudin* this Court stated that "[t]he Constitution gives a criminal defendant the right to have a *jury* determine, beyond a reasonable doubt, his guilt of *every* element of the crime with which he is charged." *Gaudin*, 515 U.S. at 523 (emphasis added).

Moreover, a legal presumption cannot operate to shift the burden of persuasion to the accused, as this violates due process. *Sandstrom v. Montana*, 442 U.S. 510, 523-524 (1979). *See also* Jerries & Stephan, *Defenses, Presumptions, and Burden of Proof in Criminal Law*, 88 YALE L.J. 1325 (1979); Hug, *Presumptions and Inferences in Criminal Law*, 57 Mil. L. Rev. 81 (1972).

The military judge denied Lance Corporal Rose these fundamental rights by creating a mandatory conclusive presumption that one of the elements of the offense that he was charged with was proved.

The first element of Article 90, disobedience of a superior officer's order, is "[t]hat the accused received a *lawful* command from a certain commissioned officer." MCM, Part IV, Paragraph 14.b.(2)(a)(emphasis added).

Military justice procedure and case law supports a *rebuttable* presumption that an order is lawful when given. See, e.g., MCM, Part IV, Paragraph 14.c.(2)(a)(i); *United States v. Smith*, 45 C.M.R. 5, 8 (1972). An order's lawfulness is normally rebutted by 'some evidence.' *United States v. Wartsbaugh*, 45 C.M.R. 309, 314 (1972). Therefore, a constitutionally sound presumption of lawfulness can exist where the accused has the burden of production of some evidence to rebut the presumed lawfulness of the order. Once this production is made, the party bearing the burden of persuasion, in this case the Government, will have the issue resolved against it if, after all the evidence is considered, the *trier of fact* remains uncertain on the point.

Unfortunately, military courts have of late refused to submit the rebuttable presumption of an order's legality to a trier of fact. The trend began in *United States v. New*, 50 M.J. 729 (Army Ct. Crim. App. 1999) pet. for review granted, 52 M.J. 465 (C.A.A.F. 1999). In *New*, the Army Court of Criminal Appeals refused to allow a presumption of lawfulness to be reviewed by the trier of fact because the trial

judge deemed the order legal. This trend is now being followed by other trial judges throughout the Armed Forces, particularly in anthrax vaccination refusal cases. The effect is that if a trial judge decides that an order is lawful, as in the instant case, that determination is presented to the trier of fact as a mandatory conclusive presumption.

Mandatory conclusive presumptions are wholly unconstitutional. *Sandstrom*, 442 U.S. at 526; *see also Francis v. Franklin*, 471 U.S. 307, 317 (1985). This Court "disapprove[s] the use of mandatory conclusive presumptions not merely because it conflict[s] with the overriding presumptions of innocence with which the law endows the accused,... but also because it invade[s] [the] fact-finding function which in a criminal case the law assigns solely to the jury." *Carella v. California*, 491 U.S. 263, 268 (1989) (quoting *Sandstrom*, 442 U.S. at 523 (citations omitted)). The instant case embodies this Court's concern in *Carella* in two ways:

First, the mandatory conclusive presumption of lawfulness denies Lance Corporal Rose his rights to due process and trial by members because it allows an element of the offense to be proven by the military judge and not the trier of fact. The military judge not only took it unto himself to declare the order lawful, but went even further, and barred Lance Corporal Rose from presenting to the members a defense to the lawfulness element by excluding any evidence contrary to his conclusion as irrelevant. At the conclusion of the trial, the trial judge instructed the members on the mandatory conclusive presumption of lawfulness and they deliberated without having heard any contrary evidence

regarding the order's lawfulness.

Second, the mandatory conclusive presumption of lawfulness is devoid of any predicate factors that indicate its reliability. This Court has stated that a presumption is unconstitutional "unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Leary v. United States*, 395 U.S. 6, 37 (1969); *see also Tot v. United States*, 319 U.S. 463 (1943). In the instant case, the Government has shown that Lance Corporal Rose was given an order by his commanding officer and that he refused the order. Those facts do *not* 'flow' with *any* assurance to the conclusion that the order was legal. There is a yawning gap between the facts that can be proven and the presumed fact that the order to take the vaccine was lawful.

b. The presumption of lawfulness was rebutted.

A thorough rebuttal of the presumed fact is an additional basis to show that the military judge's ruling on the mandatory conclusive presumption is unconstitutional. Lance Corporal Rose made such a rebuttal during the pretrial motions.

A service member is not required to follow an order if the order conflicts "with the statutory or constitutional rights of the person receiving the order." MCM, Part IV, ¶ 14.c(2)(a)(iv); *United States v. Johnson, III*, 45 M.J. 88, 92 (1996) (only constitutional or statutory provisions can be a defense to disobeying an order).

The order requiring Lance Corporal Rose to submit to the anthrax vaccination is illegal because it contradicts the express terms of 10 U.S.C. § 1107 (2000). That statute, entitled *Notice of Use of an Investigational New Drug or a Drug Unapproved for its Applied Use*, explicitly confers rights to servicemembers. The statute requires that whenever the Secretary of Defense requests or requires a member of the armed forces to receive an Investigational New Drug [IND] or a drug unapproved for its applied use, the Secretary *shall* provide the member with notice and the servicemember *must* give his or her prior consent. 10 U.S.C. § 1107(d), (f). Only the President may waive the requirement for prior consent. 10 U.S.C. § 1107 (f). The statute is reinforced by Presidential Executive Order 13139 (1999). To date there has been no presidential waiver as to the use of the anthrax vaccine.

Title 10, section 1107 of the U.S. Code applies to this case because the anthrax vaccine is both an IND as defined by the Food and Drug Administration [FDA] and is a drug unapproved for its applied-for use. The term 'investigational drugs' embraces so-called 'new' drugs. 21 C.F.R. § 312.3(b) (2000). A drug is 'new," even if it has been in use for years, if there is a proposed change in the target use of the product, a change in the formula, dilution of the drug, or a change in its route of administration. *See generally, What Is A "New Drug" Within the Meaning of § 201(p) of the Federal Drug and Cosmetic Act*, 133 A.L.R. Fed 229 (1996).

The anthrax vaccine is an IND under 10 U.S.C. § 1107 for the following reasons:

> 1) The sole manufacturer of the anthrax vaccine, Bioport Corp., expressly admitted the IND status of the vaccine by its submission of an IND application to the FDA to change the applied use of the vaccine to include protection against inhalational anthrax.
> 2) The vaccine's approved labeling and its use history support only its use against cutaneous (skin contact) anthrax, and not inhalational anthrax;
> 3) The Department of Defense has changed the shot sequence from the six shots specified in the anthrax vaccine's labeling to just three shots; and
> 4) The anthrax vaccine is being used on a vastly larger population than originally intended.

During the pretrial motions, Petitioner submitted the following evidence in support the above four reasons: 1) a copy of the current IND application for the anthrax vaccine, which specifies the intent by the manufacturer to change the labeling of the anthrax vaccine to include inhalational anthrax; 2) the testimony of Dr. George Robertson (Col. USA, Ret.), an expert in the field of vaccines, who stated that the anthrax vaccine has not been effectively tested against inhalational anthrax; 3) the testimony and declaration of former FDA employee Mr. Sammie Young (Col. USAF, Ret.), who worked for over thirty years as an FDA employee and is familiar with its procedures, and who stated that in his opinion the anthrax vaccine labeling does not include inhalation anthrax and that the IND application requires strict compliance with the informed consent requirements of 10

U.S.C. § 1107; 4) copies of 10 U.S.C. § 1107 and Executive Order 13139; 5) a statement from Kathryn C. Zoon, Phd., the current director of the Center for Biological Evaluation and Research, the FDA agency charged with oversight of the IND licensing process, which indicated that BioPort's IND application for inhalational anthrax is still current; and 6) evidence that the shot sequence has been altered from six shots to three shots (including the a government witness admission that the shot sequence was not being followed).

By presenting the evidence mentioned above, Lance Corporal Rose successfully met his burden of production and rebutted the order's presumption of lawfulness. At this point the Government was required to prove the element of the order's lawfulness beyond a reasonable doubt to the trier of fact. *Unger v. Ziemniak*, 27 M.J. 349, 359 (C.M.A. 1989). By stating in his written findings that he found the order to be legal beyond a reasonable doubt, the military judge acknowledged that the presumption of lawfulness had been rebutted.

c. The Government failed to show that the anthrax vaccine is not an investigational new drug

By successfully rebutting the legality of the order, Lance Corporal Rose demonstrated a factual dispute regarding the IND status of the vaccine. Although Lance Corporal Rose had already chosen a trial by jury members, the military judge decided to rule on the factual dispute using the "beyond a reasonable doubt" standard as if *he* were the fact finder.

The *only* evidence offered by the Government to meet its burden were two letters from FDA employees stating that the use of the vaccine against inhalation anthrax is "not inconsistent" with its labeling. The first letter, dated March 13, 1997, is from Dr. Michael Friedman to former DoD Assistant Secretary of Defense/Health Affairs Dr. Stephen C. Joseph. The second letter was written on November 26, 1999, to Congressional Representative Dan Burton by FDA Associate Commissioner Melinda Plaisier. Although both letters state that the vaccine is not an IND, they are strikingly circumspect in their assessment of the status of the anthrax vaccine as an IND.

In rebuttal, Petitioner directed the military judge to this Court's ruling on agency letters in *Christensen v. Harris County*, 529 U.S. 576 (2000), the FDA's own rules on writing official opinion letters contained in 21 C.F.R. §10.85 (2000), and the only official FDA assessment of the anthrax vaccine, contained in 50 Fed. Reg. 51002 (1985).

In *Christensen*, this Court elaborated on its previous decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which held that official agency interpretations could be given deference in interpreting an ambiguous statute. In *Christensen* this Court held that agency "[i]nterpretations such as opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – *do not* warrant *Chevron*-style deference." *Id.* (emphasis added).

However, even to reach the inferior level of deference

contemplated in *Christensen,* documents must be in the form of 'opinion letters.' The two letters submitted by the defense were not even 'opinion letters' under FDA rules. FDA regulations specifically state that:

> [A] statement made or advice provided by an FDA employee constitutes an advisory opinion only if it is issued in writing under this Section. A statement or advice given by an FDA employee orally, or given in writing but not under this Section or §10.90 is an informal communication that represents the best judgment of that employee at that time but does not constitute an advisory opinion, does not necessarily represent the formal position of the FDA, and *does not bind or otherwise obligate or commit the agency to the views expressed.* (emphasis added)

21 C.F.R. § 10.85 (k).

The two letters relied on by the Government and the military judge do not bind the agency, do not carry the weight of law, do not represent and may not be used to represent the FDA's official policy regarding the anthrax vaccine.

In fact, the most recent *official* FDA document that references the use of this vaccine against inhalation anthrax is an FDA study on the anthrax vaccine published in the Federal Register on December 13, 1985. *See* 50 Fed. Reg. 51002 (1985). In this document, the FDA states its opinion requiring the use of this vaccine for inhalation anthrax in

humans:

> "[The vaccine] is recommended for individuals in industrial settings who come in contact with imported animal hides, furs, wool hair (especially goat hair), bristles, and bone meal, as well as in laboratory workers involved in ongoing studies on the organism. In general, **safety of this product is not a major concern, especially considering its very limited distribution.** [the] anthrax vaccine poses no serious special problems other than the fact that its **efficacy against inhalation anthrax is not well documented.** The Panel believes that there is sufficient evidence to conclude that anthrax vaccine is safe and effective under the **limited circumstances** for which this vaccine is employed." (emphasis added).

Id. at 51117.

The weak standing of employee letters in *Christensen* is even weaker in this case, where the two letters are not even 'opinion letters,' but merely represent a position taken by an individual who holds rank within the agency. The letters were inappropriate for the military judge to rely upon, not only because of their informal, unofficial nature, but also because of their doubtful veracity. In any event, there is no ambiguity in 10 U.S.C. § 1107 that would trigger any deference under *Christensen* or *Chevron*. The Government can not reasonably be found to have met its burden based solely on the two letters.

REASONS FOR GRANTING THE PETITION FOR WRIT OF MANDAMUS AND PROHIBITION

The traditional use of a writ of mandamus in aid of appellate jurisdiction both at common law and in federal courts has been to confine an inferior court to the lawful exercise of its prescribed jurisdiction, or to compel it to exercise its authority when it is its duty to do so. This supplementary review power granted by 28 U.S.C. §1651(a) should be used only in exceptional cases where there is clear abuse of discretion or usurpation of judicial power. *Bankers Life & Casualty Co. v Holland*, 346 U.S. 379 (1953).

In providing that only exceptional circumstances justify invocation of the extraordinary remedy of mandamus against a lower court, this Court has stated that a writ of mandamus may be issued when: (1) the party seeking issuance has no other adequate means to attain the relief he desires; and (2) he satisfies the burden of showing that his right to issuance of the writ is clear and indisputable. *Kerr v United States Dist. Court for Northern Dist.*, 426 U.S. 394, 403 (1976)

Federal Courts of Appeal have identified three additional circumstances that call for the issuance of a writ of mandamus: 3) the party seeking relief will be damaged or prejudiced in a way not correctable on appeal; 4) the error is an oft-repeated error or manifests a persistent disregard of federal rules; and 5) the issue raises new and important problems, or issues of first impression. *Bauman v. United States District Court*, 557 F.2d 650, 654-655 (9th Cir. 1977).

1. Lance Corporal Rose has no other adequate means of relief.

The military appellate courts have considered and denied Lance Corporal Rose's petitions for extraordinary relief. Lance Corporal Rose has been convicted and sentenced. Most important, part of his sentence includes a bad-conduct discharge. Under 10 U.S.C. § 866(b) a servicemember who receives a bad-conduct discharge is entitled to an appeal by right. However, as stated above, the instant case is still pending the convening authority's action. As such, a convening authority can disapprove a bad-conduct discharge. *See* R.C.M. 1107, MCM (2000 ed.). In such a case there is *no appeal* of right. *See* 10 U.S.C. § 869(b). There is strong indication that the convening authority in the instant case may be prepared to exercise his power by disapproving Lance Corporal Rose's bad-conduct discharge.

Moreover, if the convening authority disapproves Lance Corporal Rose's sentence, in addition to the lack of access to appellate courts, Lance Corporal Rose can be ordered to take the vaccine and be punished *seriatim*. So long as a bad-conduct or dishonorable discharge is not awarded or approved and confinement is kept under one year, a servicemember may be continually punished without access to appellate review under 10 U.S.C. § 866(b).

Considering the status of the instant case and the fact that all other forms of appeal have been exhausted, this Court is currently the only form of legal review and relief to which Lance Corporal Rose has access.

2. Lance Corporal Rose has a clear and indisputable right to relief.

The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged. Where a judge refuses to allow the jury to pass judgement on a question of law and fact, that judge infringes upon a defendant's constitutional rights. *United States v. Gaudin,* 515 U.S. 506, 522-523 (1995).

The military judge's refusal to allow the court-martial members to pass judgement on a mixed question of law and fact, namely whether an order is "lawful", is a clear and indisputable usurpation of the powers of those court-martial members. This issue is further discussed *supra.*

3. Lance Corporal Rose will suffer prejudice not correctable on appeal.

As the convening authority has not acted in accordance with 10 U.S.C. § 860, Lance Corporal Rose currently has *no* right of appeal.

4. This is an oft-repeated error, in disregard of federal rules.

In the course of two weeks, the Navy-Marine Court of Criminal Appeals denied five petitions for extraordinary relief from three different military judges who each refused to permit the accused servicemembers to contest the legality of the order before the members. Members of other branches of

the Armed Forces have also been denied their rights to contest the lawfulness of orders to take the anthrax vaccine. This oft-repeated error disregards the Fifth and Sixth Amendments to the constitution, specifically the rights to due process and to a jury trial. *Gaudin,* 515 U.S. at 522-523.

5. This is a new and important problem.

After the Gulf War, when on two occasions the Department of Defense was authorized to administer non-approved drugs to servicemembers, Congress and the President acted to create rules that mandated a rational and deliberative process for determining when non-approved drugs could be given to servicemembers without their informed consent. 10 U.S.C. § 1107; Executive Order 13139. The anthrax cases are the first to test the Department of Defense's commitment to the rule of law in this area, and both Congress's legislation and the President's Executive order have been ignored.

Taken together the above five factors developed by this Court and the Circuit courts are fulfilled by Lance Corporal Rose's circumstances. Therefore, the substantive issues of his case should be reviewed.

CONCLUSION

The military judge usurped the province of the trier of fact by deciding the first element of the Article 90, UCMJ offense of disobeying a superior officer. A military judge's powers are limited to the legal determination as to whether the presumption of lawfulness has been rebutted, and can only rule on the legality of the order if a question remained a question of law, not of fact. More importantly, a military judge cannot conclude under any circumstances, given the rebuttal evidence in this case and this Court's prior opinions, that the order's lawfulness, an element of the offense, was a mandatory conclusive presumption of fact.

WHEREFORE, this Court should rule that Lance Corporal Ocean T. Rose must be afforded the right to assert his protection under federal statute, and to contest before a trier of fact the validity of the order to receive the anthrax vaccine.

Respectfully submitted,

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APPENDIX

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON D.C.

BEFORE

W.A. DeCICCO **D.A. ANDERSON**
C.A. PRICE

ROSE, Ocean T.
Lance Corporal (E-3), U.S. Marine Corps

Petitioner
v.

DELZOMPO, F.A.
Lieutenant Colonel, U.S. Marine Corps
Military Judge

and

COMMANDING OFFICER
Headquarters & Headquarters Squadron
MCAS Miramar San Diego, CA
Convening Authority

Respondents

NMCM 200001187
Decided 29 November 2000

Decision on Petition for Extraordinary Relief in the Nature of a Writ of Mandamus

CDR RICHARD BAGLEY, JAGC, USN, Appellate Defense Counsel
Capt CURTIS M. ALLEN, USMC, Appellate Defense Counsel
Capt FELIPE PAEZ, USMCR, Trial Defense Counsel
Maj ROBERT M. FUHRER, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

The petitioner requests extraordinary relief under the All Writs Act, 28 U.S.C. § 1651(a), in the nature of a writ of mandamus and a stay of the proceedings below. The petitioner argues that the respondent military judge erred by finding at trial, as a matter of law, that an order to receive an anthrax vaccination was lawful, by granting the Government's motion *in limine* to bar the petitioner from presenting evidence before the court-martial members on the safety, efficacy, and necessity of the anthrax vaccine, and by denying four motions of the petitioner to dismiss the charges and for other relief. The petitioner requested that we stay the court-martial proceedings, order the preparation of a transcript of pertinent parts of the testimony below, and reverse the military judge's rulings. We granted the petitioner's request for the stay and for preparation of pertinent parts of the record. After careful consideration of the petitioner's requests, we find that he has failed to demonstrate that he is

entitled to extraordinary relief as a clear and indisputable right. Therefore, we deny his petition.

I. Facts

The petitioner is charged with willfully disobeying the order of a superior commissioned officer and violating a lawful general regulation in contravention of Articles 90 and 92, Uniform Code of Military Justice, 10 U.S.C. §§ 890 and 892. Both charges stem from the petitioner's refusal to receive the anthrax vaccine. He argues that the rulings of the military judge effectively deny him the right to present an affirmative defense because he will not be permitted to argue to the court-members that the order to take the vaccine is unlawful. He asserts that the anthrax vaccine that is currently being administered to U.S. military personnel is both an investigational new drug [IND] and an experimental drug that is being used in a manner inconsistent with its original license from the Food and Drug Administration [FDA]. His argument is that he cannot be compelled by military orders to receive such a vaccine without his consent under 10 U.S.C. § 1107 and Executive Order [E.O.] 13139 of September 30, 1999.

The military judge was presented with conflicting opinions. Two FDA officials were of the opinion that the current use of the anthrax vaccine was consistent with the original FDA license. On the other hand, two other individuals believed that the use of the vaccine

against inhalational anthrax constituted the use of an IND and an experimental drug, thereby requiring prior consent. The military judge found that the current use of the anthrax vaccine did not render it an IND or experimental drug within the meaning in 10 U.S.C. § 1107 and E.O. 13139. He also found that evidence regarding the safety, efficacy, and necessity of the anthrax vaccine was not relevant.

II. Entitlement to Extraordinary Relief

The writ of mandamus is normally issued by a superior court to compel a lower court "to perform mandatory or purely ministerial duties correctly." BLACK'S LAW DICTIONARY 973 (7th ed., 1999). In other words, its purpose is "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Dew v. United States,* 48 M.J. 639, 648 (Army Ct.Crim.App. 1998)(*quoting Roche v. Evaporated Milk Association,* 319 U.S. 21, 26 (1943))(internal quotation marks omitted).

The issuance of such a writ is "a drastic remedy that should be used only in truly extraordinary situations." *Aviz v. Carver,* 36 M.J. 1026, 1028 (N.M.C.M.R. 1993)(*citing United States v. LaBella,* 15 M.J. 228 (C.M.A. 1983)). It should not be invoked in cases where other authorized means of appeal or administrative review exist, and it is generally disfavored because it disrupts the normal process of orderly appellate

review. *Id.; McKinney v. Jarvis,* 46 M.J. 870, 873-74 (Army Ct.Crim.App. 1997). For this reason, "[t]o justify reversal of a discretionary decision by mandamus, the judicial decision must amount to more than even gross error; it must amount to a judicial usurpation of power." *LaBella,* 15 M.J. at 229 (*citing United States v. DiStefano,* 464 F.2d 845, 850 (2d Cir. 1972)). To justify extraordinary relief, the petitioner bears the burden of demonstrating that he is entitled to it as a clear and indisputable right. *Aviz,* 36 M.J. at 1028.

When an accused is charged with disobeying a lawful order under Article 90, UCMJ, the order is presumed to be lawful, unless it is patently illegal. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Part IV, ¶ 14c(2)(a)(i). When an accused is charged with violating a lawful general order or regulation under Article 92, UCMJ, the general order or regulation is lawful unless it is contrary to the Constitution, the laws of the United States, or lawful superior orders or for some other reason is beyond the authority of the official issuing it. MCM, Part IV, ¶ 16c(1)(c). This presumption, however, is rebuttable. *Unger v. Ziemniak,* 27 M.J. 349, 359 (C.M.A. 1989). If the lawfulness of an order is challenged, it is normally an issue of law to be resolved by the military judge as an interlocutory matter. Art. 51(b), UCMJ; RULE FOR COURTS-MARTIAL 801(e)(1) and (5), and Discussion, M.C.M.; *United States v. Carson,* 15 C.M.A. 407, 35 C.M.R. 379

(1965); *United States v. New*, 50 M.J. 729, 738 (Army Ct.Crim.App. 1999), *petition granted*, 52 M.J. 465 (1999). If the military judge determines that the presumption of lawfulness has not been rebutted, the issue is not put to the members. *Unger*, 27 M.J. at 359.

III. Discussion

In this case, the military judge found that the orders at issue were lawful. After carefully considering the evidence presented, he did not rule against the evidence, but he ruled after evaluating a conflict in the expert opinions. We find that this was not a judicial usurpation of power, but a discretionary decision that is reviewable in the course of normal appellate review if the appellant is convicted. Contrary to the petitioner's averments before us that he had rebutted the presumption of lawfulness, the military judge effectively found that the petitioner had not rebutted it. The petitioner has not shown that the military judge's rulings were so contrary to statute, settled case law, or valid regulation as to deny him relief that is clearly and indisputably due him as a matter of right. Accordingly, we conclude that the drastic remedy of mandamus is neither necessary nor appropriate.

IV. Disposition

The Petition for Extraordinary Relief in the Nature of a Writ of Mandamus is denied without prejudice to the petitioner's right to raise the

issues contained herein in the normal course of appellate review if he is convicted. Our Order of 7 August 2000 to stay the court-martial proceedings below is hereby dissolved.

For the Court

R.H. TROIDL
Clerk of Court

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
WASHINGTON, D.C. 20442-0001

IN RE	) USCA Misc. Dkt.
Ocean T.	) No. 01-8008/NA
ROSE (252-69-5004),	) Crim.App. Dkt.
Petitioner	) No. 200001187
	)
	)
	) ORDER
	)
	)

On consideration of appellant's petition for extraordinary relief in the nature of a writ of mandamus and stay of proceedings below, it is, by the Court, this 21st day of November, 2000,

ORDERED:

That the stay of proceedings is hereby denied; and

That the petition for extraordinary relief is hereby denied without prejudice.

For the Court,

/s/ Thomas F. Granahan
Clerk of the Court

cc: The Judge Advocate General of the Navy
Counsel for Petitioner (ALLEN)
Counsel for Respondent